Office Supreme Court
FILED
OCT 19 190

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

against

THE PENNSYLVANIA RAILROAD COMPANY and the UNITED NEW JERSEY RAILROAD and CANAL COMPANY,
Appellees.

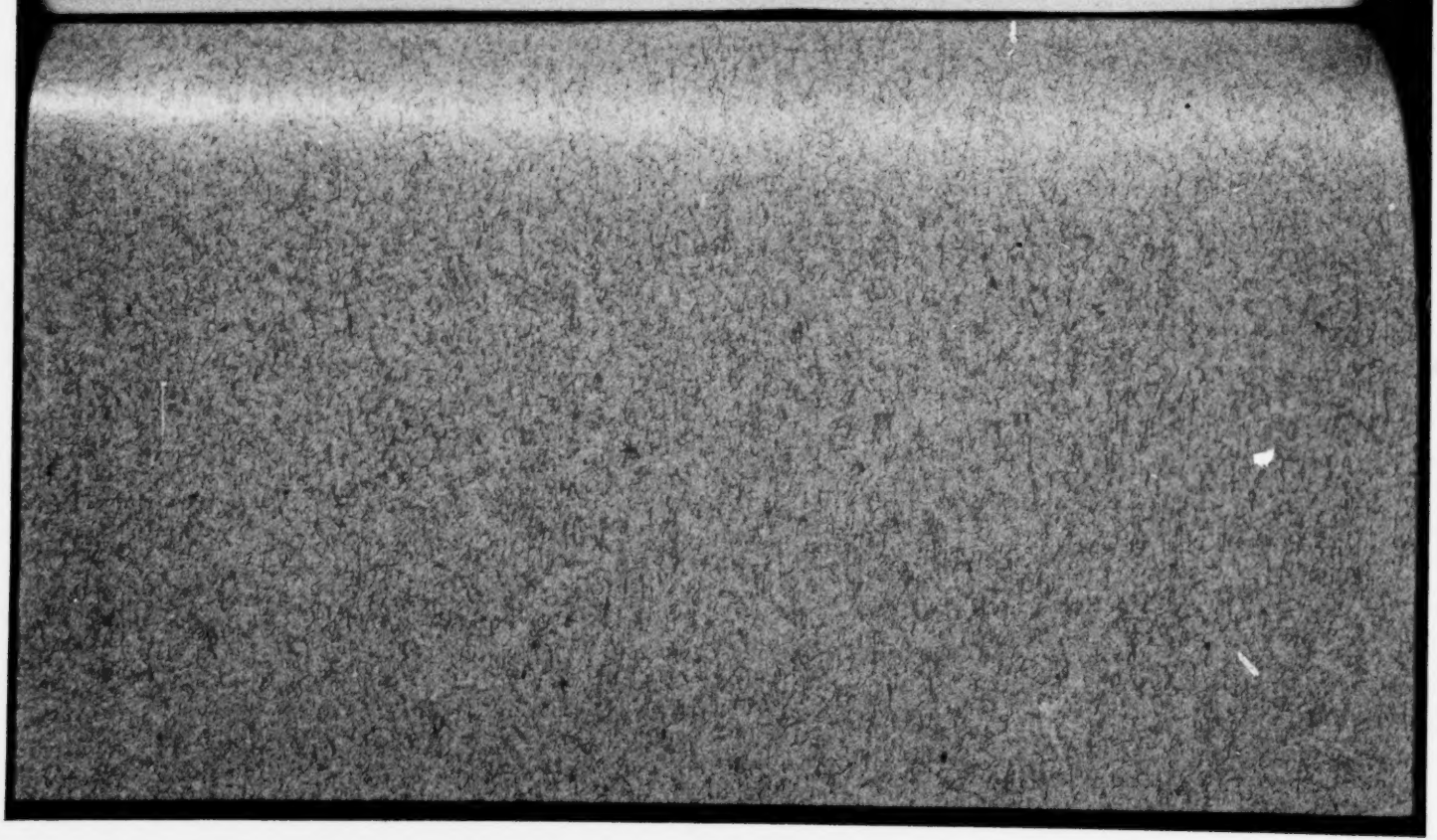
Nos. 89, 120.

Brief of Appellant in Reply.

RUSH TAGGART,
Solicitor for Appellant.

JOHN F. DILLON,
RICHARD VLIET LINDABURY,
HENRY D. ESTABROOK,
Of Counsel.

New York.
Stillman Appellate Printing Co.
1904.



In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant, vs. THE PENNSYLVANIA RAILROAD COMPANY and the United New Jesey Railroad & Canal Company, Appellees.	October Term, 1904, No. 89.
THE WESTERN UNION TELEGRAPH COMPANY, Petitioner, vs. THE PENNSYLVANIA RAILROAD COMPANY and the United New Jersey Railroad & Canal Company.	No. 199.

1. Requirement to remove lines of telegraph company.

It is claimed in the brief, that whatever right the telegraph company may have to occupy the premises of the defendant under the Act of 1866, it cannot assert such right against its agreement

with the Pennsylvania Railroad Company of September 20, 1881, without first vacating the defendant's premises.

It is said (Brief, p. 80): "We assert in the present case that possession was given to the appellant upon its express abandonment of all rights and easements theretofore vested in it. It admitted as a condition precedent to the contract under which it was allowed to occupy the right of way for twenty years that 'the rights and easements of the telegraph company upon the right of way of said railway company shall be such only as are granted by this agreement and shall cease with its termination.'"

How baseless this argument is will appear at once by reference to the verified bill of complaint, which, for the purposes of this argument, must be taken as confessed, since the Court, *sua sponte*, dismissed it as wholly without equity.

The bill shows that the Telegraph Company did not *enter* upon the defendants' right of way under the agreement of 1881; that it did *not* erect its poles and wires under this agreement, or under any agreement, a term of which was that it would remove them "at a certain time or after a certain notice." The defendants' entry into possession of the complainant's right of way was made and its poles and wires were erected many years before the agreement of September, 1881, was entered into, and, therefore, it will not do to say for any purpose whatsoever that the existing situation was created by virtue of anything contained in that agreement.

It is further said (Brief, page 81) that the contract of 1881 provides that "the rights and easements of the Telegraph Company upon the right of way of the railroad company shall be such only as are granted

by this agreement, and shall cease with its termination," and that by this provision the telegraph company waived all rights upon the railroad of the defendant company other than those conferred by that agreement, including in the waiver any that existed under the Act of 1866.

The answer to this is:

(*a*) That by reading the whole paragraph from which the above excerpt is taken, it will appear that what the telegraph company relinquished was only contract rights existing under prior or other contracts, and not rights existing under its charter or by operation of law. The provision is that:

"Any easement or right of way heretofore acquired by the Telegraph Company upon any of the roads embraced in this agreement, *either directly by contract or by assignment of contracts or agreements made by companies with the railroad company, or with any other of the companies whose roads or property are embraced in the schedule hereto attached*, is hereby relinquished and abandoned, and the rights and easements of the Telegraph Company upon the right of way of said Railroad Company shall be such only as are granted by this agreement, and shall cease with its termination."

(*b*) That it was beyond the power of the telegraph company to waive the rights acquired by it under the Act of 1866, and that, if it attempted to do so by this agreement, such attempt was futile.

The rights conferred upon telegraph companies by the Act of 1866 are not conferred for the private benefit of such companies, but for the service of the public and the Government. They are expressly made non-assignable, and the companies are required to agree that they shall be subject to acquisition by the Government, if the latter

shall require them. Manifestly the companies cannot take up these rights or lay them down at will, and, having taken them up and entered into a solemn compact with the Government, they cannot dispose of them in derogation of that contract. Nothing is better settled than an alienation, whether voluntary or involuntary, of the franchises of a quasi-public corporation, or of the property necessary to the exercise of such franchises, is illegal and void.

Suppose that the Pennsylvania Railroad Company had acquired a portion of its right of way by lease (as many railroad companies have done) and had agreed in such lease to vacate the premises at the end of the term, waiving all rights, public or private, which it had, might have or could have in the premises, otherwise than under the agreement, would anybody contend that in such a case the railroad company could not condemn a further estate in the leasehold property until the end of the term and until it had removed its tracks and traffic therefrom? We imagine not, and yet, unless such a contention could be made, and could be made good, the argument for the defendant on this point, even conceding the correctness of its false premise, must fail.

Justice vs. Ry. Co., 87 Penn. St., 28.
Heise & Mifflin vs. Penn. R. R. Co., 12 P. J. Smith, 62 Penn. St., 67.

1. Doctrine of Landlord and Tenant.

Appellees further invoke the rule which denies to a tenant the right to impeach the title of his landlord, or to hold over after the end of his term under a title adverse to that of his landlord.

We submit that the rule invoked has no application to this case.

(1) It is limited to cases where the tenant has entered under the lease set up, and therefore does not apply to cases where the tenant's possession antedates such lease.

Tewksbury vs. Magraff, 33 Cal., 245.
Franklin vs. Merida, 35 Cal., 558.
Insurance Co. vs. Stroup, 63 Cal., 153.
Davis vs. McGrew, 82 Cal., 135.
Tullis vs. Tacomo Land Co., 19 Wash., 140.
Phillips vs. Smoot, 1 Mackey (D. C.), 478.

(2) It is also limited to cases where the title set up was acquired by the tenant from a third party, and does not apply where the title was in the tenant himself at the time of the lease.

Thus, in *Accidental Insurance Co. vs. Mackenzie*, 10 Common Bench Reports (N. S.), 870, it was held that

"where a person having possession of land under a good title, became tenant, and paid rent to a stranger, he was not estopped after his tenancy was determined, and before he had given up possession of the premises, from setting up his own prior title in an action of ejectment by his lessor."

In this case the defendant went into possession of certain premises under an agreement with Messrs. Maltby & Company, who were lessees under the Bank of England. After the making of this agreement Messrs. Maltby & Company, being in difficulties, made an assignment of their whole term to the plaintiffs. From that time the defendant paid rent to the plaintiffs and submitted to a distress put in by

them. Thereafter the plaintiffs gave notice to the defendant to quit, which the latter refused to do. Thereupon the plaintiffs brought an action of ejectment. The defendant set up his prior title under the agreement with Maltby & Company, but the plaintiffs had judgment upon the ground that the defendant was estopped from denying the plaintiffs' title. On rule to show cause Chief Justice EARL said:

"I am of opinion that this rule should be made absolute on the point of law. This was an action of ejectment for premises to which the plaintiffs had no title whatever; and, the defendant having a title, the parties came to an agreement that the plaintiffs should demise to the defendant what he already had a good title to. What effect this might have had as to estopping the defendant from disputing the plaintiffs' title during the continuance of the demise we are not called upon to determine. Here the plaintiffs put an end to the tenancy and then brought their action of ejectment, and now they strive to keep their verdict, *on the ground that the defendant was estopped from disputing their title until he had restored the premises into their possesseon.* If that rule applied, the verdict would stand, and the moment after the defendant might be plaintiff in another action of ejectment and recover the same premises. I am fully aware of the salutary effect of the rule that the party *who has derived possession from another* shall not dispute his title until possession has been restored. I quite agree with Mr. Brown (plaintiffs' counsel) as to the effect of the cases he had cited, where one party has attorned to another; and I entirely adhere to the principle laid down in those cases *that it is not competent to set up the title of a third party unless there has been fraud or misrepresentation.* But, giving full effect to the general principle, *I can find no authority for the doctrine that a person taking a lease of his own land is not entitled, at the expiration of the*

term, to dispute the title of his lessor. We do not overrule any authority, but, on the contrary, we agree with the passage cited from Co. Litt."

WILLES, J., said:

"I am of the same opinion. I admit the importance of the rule obliging the person who has obtained possession of property as a tenant to another to give up possession to his landlord, *and not set up the title of a third party*, and that this rule is binding. But this is a case where the title of the tenant continuing after his tenancy expires, he is desired to give up possession at the end of his term. If the plaintiffs were to recover in this action, the plaintiff might bring ejectment and recover the same premises on exactly the same evidence as has been given in this action."

BYLES, J., concurred.

This judgment, by one of the strongest Courts that England ever had, seems to be exactly applicable to this case.

If it be true, as we think we have demonstrated *ante* in our main brief, that the appellant has a right to occupy the appellees' right of way under the Act of 1866, and it be also true, as appellees must concede, that that right was as complete and perfect when the lease of 1881 was made as it is now, and such right has not expired, but, as the bill puts it, is a continuing right based upon a continuing consideration, then the exact counterpart of the English case is presented and the argument is fully answered.

(3) The rule is further limited to cases where the title set up accrued before the lease was made. It has never been held that a tenant might not set up, at the end of his term, in defense of his possession, a title acquired by him either from his landlord or

a third party, provided such title arose after the making of the lease.

Thus, the rule is stated in *Howell vs. Ashmore*, 2 Zab., 265, as follows:

"A tenant who enters upon premises by virtue of a lease, or by permission of another, is not permitted, in an action by the landlord, to dispute the title of the latter, which by his own act he has acknowledged."

In 2 *Taylor's Landlord and Tenant*, Sec. 705, it is said:

"But the rule that a tenant is precluded from denying the title of his landlord is not to be extended so as to estop him from denying the validity of rights which had no existence when he took possession, and he will be estopped from denying only what he has once admitted."

In *Chamberlain vs. Perry*, 138 Mass., 546, it was held that

"The owner of an equity of redemption of land, not in possession, and not entitled to possession, as against an equitable assignee of the mortgage, cannot maintain an action on the General Statutes, Chapter 137, to recover such possession, against one who originally entered as his tenant under a lease for a year, but who, before the expiration of the year, took a lease from the equitable assignee of the mortgage, and who, at the time of the bringing of the action, which was after the expiration of the year, was in possession under the latter lease."

In *Shields vs. Lozear*, 5 Vr., 496 (N. J. Ct. of Err. & App.), it was held that

"A tenant who holds a mortgage on the demised premises, the money secured by which is due on the day on which his lease expires, may continue to hold the premises under the mortgage, the mortgage money not being paid, without first surrender-

ing the premises to the landlord, although in the lease he has covenanted to yield up and surrender possession of the premises to his landlord at the expiration of his term."

The opinion is by Mr. Justice DEPUE. He said:

"But the argument of the plaintiff's counsel is that although the defendant's title under his mortgage was derived from the plaintiff, yet that the obligation of the defendant springing from the relation of tenancy was first to surrender and yield up to his landlord the possession of the premises, in obedience to his covenant to surrender at the expiration of the term, before he was to be permitted to assert any possession under the mortgage. The law does not carry the fealty of the tenant to his landlord to such extent."

And he added:

"If the position contended for be conceded, this result will follow: That if a tenant, during the continuance of his lease, obtain a new lease for the premises for an additional term commencing at the expiration of the term of his existing lease, he cannot enter and hold under his new lease, or defend an action of ejectment brought against him by his landlord, unless he first surrender the possession to his landlord and is by him re-admitted into the possession."

In *De Camp vs. Hibernia Railroad Co.*, 18 Vr., 43, it was held that a railroad company in possession under a lease could condemn a right of way over the demised premises, notwithstanding the lease had not expired, and notwithstanding its covenant in the lease to surrender the premises at the end of the term.

Here the right set up, in so far as it is a new right, is based on the complainant's authority to condemn, and its tender of compensation. It does

not, therefore, involve a denial of any title under which the complainant either entered or held, or which it has by such entry or holding once acknowledged.

But there is still another and more conclusive answer than any of the foregoing to the defendant's contention on this point. It is that whatever the technical rules of law might require in the case of individuals, the public convenience will not permit a *quasi* public corporation discharging public and governmental functions, and being in possession of property necessary for the discharge of such functions, to be turned out of possession by the owner of such property upon any rule or theory of law, provided it is willing and offers to make constitutional compensation to the landowner for such property.

Thus, in *New York vs. Pine*, 185 U. S., 700, Justice BREWER, speaking the unanimous judgment of the Supreme Court of the United States, said:

"A railroad corporation, being one charged by the law with performance of certain duties to the public, is allowed, under some circumstances, to set up rights connected with the land over which it operates its line of railway, which an individual or an ordinary private corporation would not generally be allowed to avail itself. Controversies in reference to the possession of land, where the rights of individuals only are involved, are purely matters of private concern. Controversies in which a corporation charged with the duties incumbent upon carriers of passengers, freight and mails, in which an effort is made by private individuals or others to take away from such corporation a part of the property in its possession, which is absolutely essential to its complete performance of the public duties required of it, become matters of more than private concern, and in which the

public is deeply and seriously interested. For this reason it has become settled law that the harsh remedies which would be allowed to one individual against another in reference to the possession of land will not be allowed to one who is seeking to recover such property from a railroad company, when exact justice can be done to such owner by giving him remedies which are less severe in their nature, and by which he would secure substantially the same rights, thereby saving to the public the right to require a performance of the public duties incumbent upon the corporation whose property is the subject matter of the controversy."

See also Joy v. St. Louis, 138 U. S., 1-47.

It is on account of the public convenience, and not at all out of consideration for their private rights, that railroad companies entering upon private lands and constructing their railroads thereon without authority of law, or entering upon conditions afterwards and often inexcusably broken, are allowed to maintain themselves in possession upon making compensation.

Thus in *Conger vs. B. & S. W. R. Co.*, 41 Iowa, 419, a railroad company had appropriated a right of way without compensating the owner therefor, although damages had been assessed. Held that ejectment would lie, but that execution for possession should not issue until the company had been granted a reasonable time, fixed by the Court, in which to pay the assessed damages and interest thereon from the date of the assessment.

In *Harrington vs. St. Paul & Sioux City R. Co.*, 17 Minn., 215, the defendant railroad company had constructed a railroad without lawful right and under circumstances which were adjudged to amount to a trespass and a continuing one. Nevertheless, on application by the landowner for an injunction the Court, following the English cases,

held that where a perpetual injunction may occasion great inconvenience to the public, as well as to the defendant, before a right of way can be obtained pursuant to law, the judgment should be in respect to the injunction that it do not issue if the defendant forthwith institute proceedings to condemn the land and promptly prosecute the same.

In *Pittsburg & Lake Erie Railroad Co. vs. Bruce*, 102 Penna. St., 23, a landowner was held entitled to recover in ejectment against a railroad company because it had occupied his premises for its right of way without authority of law; nevertheless, the Court declared that as the railroad company had a right to condemn, if the plaintiff should refuse a stay of execution until that could be accomplished, the Court below should, on application, interpose its injunction.

In *New York & Greenwood Lake Co. vs. Stanley Heirs*, 8 Stew., 283, the Montclair Railway Company had entered into an agreement with the land owner for the occupation and use of his land in consideration of the company's building a depot on the premises and certain arrangement for the running of trains. It had made default in this agreement, and the land owner had brought ejectment and recovered judgment for the possession. Thereupon the Chancellor granted an injunction until the railroad company could condemn a right of way over the plaintiff's property, and the Court of Errors affirmed the order.

In *Paterson, Newark & New York R. R. Co. vs. Kamlah*, 15 Stew., 93, the defendant claiming that he had never received compensation for a strip of land used by the complainant, brought ejectment therefor; thereupon complainant obtained a preliminary injunction to stay the action, on the ground that it had legal title to the land. The

title failing the injunction was continued until the railroad company could have compensation determined at law or in equity.

A notable instance of the application of the foregoing principle is that of the elevated railroad cases in New York. In these cases the Court ascertains the value of the easements taken by the elevated railroad company and decrees that unless payment of such sum be made by the railroad company an injunction shall issue restraining the railroad company from continuously trespassing upon the plaintiff's property, and also requiring the owner of the property to execute a deed to the railroad company for the easements upon the payment of the value of such easements as ascertained by the Court (Galway vs. Elevated Railroad Co., 128 N. Y., 132; Shepard vs. Elevated Railroad Co., 117 N. Y., 422).

These cases are cited with approval, with others, by THAYER, J., in the opinion in St. Paul, Minneapolis and Manitoba Railway Co., appellant, against the Western Union Telegraph Company and the Northwestern Telegraph Company (118 Fed. Rep., 469).

Absence of Necessity.

The defendant contends that the use of its right of way is not necessary to the complainant, as the latter can be accommodated on the public streets and highways (Brief, p. 81).

In answer to this, it is enough to refer to the language of Judge KNOWLES, in Postal Telegraph Co. vs. Oregon Short Line Co. (114 Fed., 789), where he said

"the Act of Congress itself determines whether the power of eminent domain should be put in motion for the purposes named, and whether the exigencies of the case and the public welfare require or justify its exercise."

And to that of Justice FIELD, in Boom Co. vs. Paterson, 98 U. S., 403 (quoted by Judge KNOWLES), as follows:

"When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the Legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested."

Again, the right of the Federal Government is to take this particular property for governmental use, and it no more lies with the defendant than with the complainant to say that some other property would do as well. In the Act of Congress of July 24, 1866, Congress named the species of property to be taken. It named "Post Roads," meaning by that term certainly all then existing "Post Roads." That term included this railroad as definitely as though named.

In the appellee's brief (p. 81), it is said "If there was no other method by which the telegraph company could transact its business saving upon the roadbed of the appellees, there might be a little gloss for its assertion that a waiver of its rights of occupancy therein would interfere with a public function. It will hardly be pretended, however, that telegraphic communication across the States of Pennsylvania and New Jersey cannot be secured, saving upon lines of poles and wires erected upon this roadway."

It is sufficient to say that if the right is given as contended for by the appellant under the Act of Congress of July 24, 1866, it is no answer for the appellees to say that a location could be made elsewhere.

In addition it may be suggested, that if the construction contended for by the appellees be given to the Act of Congress of July 24, 1866, it needs no prophet to say that the extension of telegraph lines across the States of Pennsylvania and New Jersey will be so impeded that it will amount to a practical prohibition upon the construction of such lines. Let it be known that this Court has construed the Act of Congress as limited by the appellees, and the extension of telegraph lines will be very difficult and so expensive as practically to put a prohibition upon the further construction of lines of this character.

In the brief of appellees reference is frequently made to matters set forth in the affidavits filed by appellees in the Circuit Court of New Jersey, upon application for preliminary injunction. In the affidavits alone will be found any suggestion of any want of space along and upon the right of way of the appellees for the continued location and maintenance of appellant's telegraph lines. Likewise in those affidavits alone will be found any reference to any contract with the Postal Telegraph Cable Company for the maintenance of telegraph lines along the right of way of the appellees. The contention of the appellant, in view of the action of the Circuit Court and of the Circuit Court of Appeals is that none of the matters as stated in the affidavits are legitimately to be considered as bearing upon the questions involved in this case. The Bill of Complaint was considered by the Circuit Court of Appeals as upon a general demurrer, and held not to be founded upon any equity in view of the facts stated therein, assuming all those facts to be true. Such was the view taken of the bill by the Circuit Court in dismissing it *sua sponte*, and it would be manifestly unjust to the appellant,

upon the *ex parte* statements contained in an affidavit, to consider matters purely of defense, when the defendants failed to plead, and no testimony has been taken in the case.

The matters of fact stated in affidavits could only be promptly considered by this Court after the witnesses had been produced with opportunity to the appellant to cross-examine and test their story. The inequity of treating statements in the affidavits as truth is manifest in the matter of the alleged claim that the Postal Telegraph Cable Company has an antecedent right upon the right of way of the appellees. Although the Postal Telegraph Cable Company's contract is dated June 25, 1902, yet in the *ex parte* affidavit, the appellee's officer does not venture to allege that that was the date of the execution of that contract. This is a matter to be considered only upon testimony where the other party has a right to cross-examine. This is also true with respect to the pecuniary benefits resulting to the appellees from the alleged contract with the Postal Company. This is a matter also legitimate to be considered only after all the facts have ben elicited in a manner consistent with the rules of law and is not to be taken upon *ex parte* statements from affidavits.

Respectfully,

RUSH TAGGART,
Solicitor for Appellant.

JOHN F. DILLON,
RICHARD VLIET LINDABURY,
HENRY D. ESTABROOK,
Of Counsel.